No. 94-1837

IN THE

Supreme Court of the United States

October Term, 1994

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,

v.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

DAVID J. BUSCH
(Counsel of Record)

DANIEL Y. SUMNER
General Counsel

FLORIDA DEPARTMENT OF INSURANCE
200 E. Gaines St.
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents
Tom Gallagher and the
Florida Department of Insurance

LIST OF PARTIES

The names of all parties to the proceeding below appear in the Petitioner's caption of this case. Tom Gallagher is no longer State of Florida Treasurer and Insurance Commissioner. Bill Nelson now holds those offices.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The statement of the case presented by Petitioner Barnett Bank of Marion County ("Barnett Bank" or "the bank") glosses over the trial testimony in this case. The result is a blurring of the differences between this case and *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 39a), which the bank cites to show "square conflict."

1. Factual Background

Barnett Bank purchased the insurance agency of Linda Clifford Insurance, Inc. and then sought a declaratory judgment from the United States District Court for the Middle District of Florida allowing it to market insurance to existing and potential customers, regardless of where located, from its branch office in the small town of Belleview, Florida. Barnett Bank sued Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance (collectively "the Department") on the theory that 12 U.S.C. § 92 preempted sections 626.988(1)(a) and (2), Florida Statutes (1993). (Pet. at 3-5.)

The Department had issued an Immediate Final Order ("IFO"), directing Linda Clifford and her associate insurance agents ("LCI") to cease and desist from insurance agency activities other than the selling of credit life and credit disability insurance. Barnett Bank filed a motion for a temporary restraining order in the District Court seeking to enjoin the Department from enforcing the IFO.

2. District Court Proceedings

The District Court denied the motion for a temporary restraining order and set a bench trial.

Barnett Bank, in a pretrial memorandum, argued that Florida had placed a "precatory gloss" on Florida Statutes section 626.988 "by attaching labels and proffering expert testimony" designed to leave a false impression that the Florida law was a piece of consumer protection legislation. The Department responded by arguing that Barnett Bank's attack on the underlying purposes of section 626.988 raised a significant factual issue as to the purposes of the statute, which determination was essential to a proper resolution of the central preemption issue.

Aside from a joint stipulation filed by the parties, the only testimony introduced at trial was by the Department, the bank's position being: "We don't have any testimony to put on."

A. Joint Stipulation

The parties filed a stipulation containing the following pertinent facts. Barnett Bank of Marion County is a national banking association organized under the National Bank Act and a wholly-owned subsidiary of Barnett Banks, Inc., the largest bank holding company headquartered in Florida and one of the largest bank holding companies in the Southeastern United States. The bank maintains its principal place of business in Ocala, Florida, has a branch located in nearby Belleview, and engages in banking primarily in Marion County, Florida. Belleview, Florida has a population of less than 5,000, as shown by the 1990 decennial census.

At the time of its purchase by the bank, LCI was a general, all-lines insurance agency, which had expanded

its customer base beyond the town of Belleview, and Marion County. The scope of its operations was limited only by the insurance needs of its customers. LCI policyholders are located in 28 Florida counties and 15 other states.

When Barnett Banks purchased LCI, the Florida licensed insurance agents of LCI became employees of the bank. Before the Department entered its IFO, the bank-owned insurance agency operated as the insurance division of the Belleview branch of Barnett Bank and acted as a general lines agent for insurance companies authorized by the State of Florida to do business in Florida. It is Barnett Bank's intention to market insurance to existing and potential customers, wherever located, from the "less than 5,000" place of Belleview, Florida.

B. Testimony at Trial

The only testimony presented to the trial court was presented by the Department through Donald A. Dowdell and Douglas A. Shropshire, two state officials most familiar with Florida Statutes section 626.988 and Florida's twenty-year enforcement experience with that statute.

Florida's Insurance Code regulates the transaction of insurance for the purpose of protecting policyholders while ensuring the availability and affordability of coverage by solvent insurance companies. Section 626.988, part of the Unfair and Deceptive Trade Practices Act within the Florida Insurance Code, prohibits insurance agents from transacting, selling, soliciting, or servicing insurance while associated with, controlled by or employed by, financial institutions.

The purposes of section 626.988 include: first, preventing coercion of insurance consumers through the express or implied force of credit; secondly, preventing the concentration of

economic resources; and thirdly, preventing unfair trade practices in the transaction of insurance. These three purposes can be found in the legislative history of the statute, caselaw, and from the Department's experience in administering section 626.988 and related provisions.

The Department's experience has shown that these three concerns, acknowledged as valid by the courts in *Glendale Fed. Sav. & Loan Ass'n v. Dep't of Ins.*, 587 So. 2d 534, 536 (Fla. 1st DCA 1991), *rev. denied*, 599 So. 2d 565 (Fla. 1992), and *Pro*duction Credit Ass'n of Fla. v. Dep't of Ins., 356 So. 2d 31 (Fla. 1st DCA 1978), are "real concerns." Mr. Shropshire testified, "yes, we absolutely found all three of those elements to be present dangers to policyholders and to the solvency of the company...."

Addressing each concern individually, the unrebutted testimony established that the problem of the inherent coercive power of credit is well recognized. Bank customers seeking, for example, an auto loan or home mortgage are steered to insurance products offered by the bank or through an insurance agency operating in association with the bank. The granting of the loan is then directly or indirectly tied to the purchase of insurance.

Secondly, as to preventing the concentration of economic resources, the Department's experience has shown that certain third party interests who have access to large customer bases and the huge premium writings generated thereby, possess sufficient leverage to dictate financial decisions to insurers to such an extent that insurers have become insolvent as a result thereof.

This problem is not unique to agents operating in association with financial institutions. Similar concerns are addressed by Florida's producer-controlled insurer statute, the managing general agent law, and the holding company statute. All of these business relationships may lead to the

problem of "reverse competition," whereby vendors and lenders controlling large blocks of business dictate commission pricing to insurers dependent on that cash flow. Instead of commission levels being driven by standard free-market pricing, insurers "leapfrog" each other, offering progressively higher commission levels to producers of large blocks of business.

Florida's experience with credit life insurance, a product marketed through financial institutions and exempted from the prohibitions of section 626.988, shows actual commission levels of eighty percent, leaving only twenty percent for the payment of claims. By way of comparison, health insurance and property and casualty insurance loss ratios are typically the exact opposite — administrative expenses are around thirty percent, leaving approximately seventy percent of premium dollars to pay claims. While section 626.988 has generally served to limit such abuses by financial institutions in the marketing of insurance, the notable exceptions to the prohibitions of section 626.988, credit life and credit disability insurance, are where Florida has encountered problems.

Thirdly, as to preventing unfair trade practices, the unrebutted testimony established that recent Department investigations revealed extensive evidence of intentional business arrangements whereby banks had sought to mislead policyholders and prospective policyholders as to the product and the bank's relationship to the product. The product would be "dressed up" to appear as a bank investment when in reality the product was insurance sold by an independent and unrelated insurance agency. Florida's elderly population is particularly susceptible to being thus misled.

In addition to these three problem areas, Florida's insurance licensure process requires a minimum number of class hours, an examination, and a clean police record for

individuals to be licensed to sell insurance products. Department investigations revealed that when banks operate contrary to section 626.988, it is not uncommon to find the bank utilizing its staff to solicit and to talk to prospective policyholders about insurance products. Section 626.988 prevents such unlicensed activities.

C. The District Court's Ruling

Five of the eighteen pages of the district court's order (Pet. App. at 26a-31a), are devoted to answering the following inquiry:

> Under McCarran-Ferguson, then, the Court's initial inquiry must be to determine whether section 626.988 is a law enacted by the State of Florida "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

(Pet. App. at 26a.) The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, insulates state laws from challenges of preemption under the Supremacy Clause where state laws are enacted for the purpose of regulating the business of insurance. Relying upon trial testimony set forth above and this Court's decisions in *United States Dep't of Treasury v. Fabe*, ___ U.S. ___, 113 S. Ct. 2202 (1993) and *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), the district court found that section 626.988 is a law enacted by the State of Florida for the purpose of regulating the business of insurance.

The district court found the State's concerns to be legitimate in that the statute indirectly protects the relationship between insurer and insured by protecting the insurance purchasing public. The court held the law "furthers the interest" of the potential policyholding public, and therefore, is a "law enacted for the purpose of regulating the business

of insurance" within the meaning of McCarran-Ferguson. *Fabe*, 113 S. Ct. at 2208.

After concluding from the evidence that section 626.988 is a law enacted for the purpose of regulating insurance (the second question presented in the Petition), the trial court addressed the third question presented in the Petition, "Whether 12 U.S.C. § 92 is an 'Act [that] specifically relates to the business of insurance' within the meaning of the McCarran-Ferguson Act." The court first noted that the bank "has consistently stated and/or conceded that § 92 is a 'bank' law, and has premised its argument accordingly." (Pet. App. at 25a, n.3.) Relying upon *Fabe*, the court then looked to whether § 92 "specifically requires" that a conflicting state statute yield. (Pet. App. at 32a.) Contrasting the facts in this case with those in *Owensboro*, the court concluded "that § 92 neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires,' *Fabe*, ___ U.S. ___, 113 S. Ct. at 2211, that apparently conflicting state laws be preempted." (Pet. App. at 35a.)

Finding Florida's statute saved from preemption as a result of the McCarran-Ferguson Act, the district court entered an opinion and order denying Barnett Marion injunctive and declaratory relief.

3. The Eleventh Circuit's Ruling

The Eleventh Circuit affirmed after reviewing the district court's fact findings for clear error, notwithstanding "none of the parties allege[d] the trial court erred in its fact-finding" (Pet. App. at 7a.) Accepting the uncontradicted evidence that section 626.988 was for the protection of Florida policyholders, the Eleventh Circuit applied this Court's "relationship" test in *Fabe*, as taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) Relying on the state court interpretations, testimony at trial, reference in

the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Supreme Court in *Nat'l Securities*, the Eleventh Circuit found that section 626.988 regulates the business of insurance because it protects policyholders. (Pet. App. at 12a-13a.) The 11th Circuit then reviewed § 92 and concluded that § 92, "neither 'specifically relates to the business of insurance,' 15 U.S.C. § 1012(b), nor 'specifically requires' that apparently conflicting state laws be preempted." (Pet. App. at 15a.) "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interest of policyholders." *Fabe*, ___ U.S. at ___, 113 S. Ct. at 2208. (Pet. App. at 13a.)

Barnett Bank complains that the Eleventh Circuit "ignor[ed] the contrary decision of the Sixth Circuit in *Owensboro*" in affirming the district court order. While the Eleventh Circuit did not cite *Owensboro*, the district court did and distinguished it factually and legally. (Pet. App. at 34a, n.5.)

REASONS FOR DENYING THE WRIT

1. There Is No Conflict between the Circuits

Contrary to Petitioner's claim, the Sixth Circuit decision in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994)(Pet. App. at 37a *et seq.*), does not conflict with this case. Three courts have found *Owensboro*, and the Kentucky statute at issue in that matter, to be factually and legally distinguishable from this case. *Barnett Bank of Marion Cty. v. Gallagher,* 839 F. Supp. 835 (M.D. Fla. 1993), *affirmed*, 43 F.3d 631, 636 (11th Cir. 1995)(Pet. App. at 1a, 17a); *First Advantage Ins. Inc. v. Green,* 652 So. 2d 562 (La. Ct. App.), *writ denied*, ___ So. 2d ___ (La. 1995).

First, the Kentucky statute only prohibits insurance sales by persons who own a majority interest in the financial institution. A bank with fractured ownership which lacks a majority shareholder is free to sell insurance to its customers as is a person who owns less than a majority interest. Florida's statute prohibits insurance agents who are associated with a bank from engaging in insurance activities. Fla. Stat. § 626.988(2); (Pet. at 5.) Florida's statute is materially different from Kentucky's statute and provides prospective policyholders greater protection from unfair trade practices (e.g., coercion, reverse competition) than Kentucky's statute.

In addition, unlike the Florida statute, the Kentucky statute is located squarely within a statutory chapter regulating *banks and trust companies*, not insurance. Located within Florida's Unfair Insurance Trade Practices Act of its Insurance Code, Florida's statute applies, with certain minor exceptions, to *all* insurance activity by agents employed by or associated with financial institutions. Although the location of a statute is not determinative under McCaran-Ferguson, it does provide insight as to the purpose of the statute. *Barnett* (Pet. App. at 9a), *citing Fabe*.

Third, no evidence was introduced at trial in *Owensboro* to establish that the purpose of Kentucky's statute is to regulate insurance. There was no trial. Rather, the case was decided by the district court on summary judgment, "there being no genuine issue as to any material fact." *Rule 56(c),* Fed. R. Civ. Proc. Unlike the district court in Florida, the *Owensboro* district court was not cited a single Kentucky case that explained the purpose of Kentucky's statute. Opinions from Kentucky's attorney general indicate that the Kentucky statute was enacted to regulate bank holding companies, and, by interpretation, their bank subsidiaries. 803 F. Supp. at 35. The purpose of Florida's statute, by contrast, is clearly to prevent policyholders and potential policyholders from being coerced or otherwise subjected to unfair trade practices. Contrary to Barnett Bank's arguments below, Florida's statute was not passed with "the identical purpose, intent, and effect as the Kentucky statute."

Contrary to Petitioner's implied assertion, similar prohibitions might be passed for a variety of reasons beyond the two found in *Owensboro* and *Barnett*. Such reasons could include prohibiting banks from engaging in risky lines of business such as insurance brokerage or prohibiting banks from competing against their depositors. Each state statute must be examined independently to determine its legislative purpose. In Florida, with its elderly population, the State has a heightened concern as to unfair trade practices.

Beyond the bank's bald assertions of a purpose other than that provided by caselaw, testimony, and legislative history, The bank has not presented any evidence that would establish that the underlying purposes of section 626.988 are different from those found below or analogous to the purpose determined by the Sixth Circuit majority in *Owensboro*for Kentucky's statute. Because a determination under McCarran-Ferguson necessarily depends upon the

underlying purpose of a state's legislation, there can be no "square conflict of circuits on the legal issues." (Pet. at 10.)

Finally, as to Question 3, whether 12 U.S.C. § 92 is an Act that "specifically relates" to the business of insurance within the meaning of the McCarran-Ferguson Act, the *Owensboro* circuit court majority declined to consider the question. (Pet. App. at 49a.) Therefore, there is no conflict between the circuits as to that issue. But the district court in *Owensboro* did address the issue, stating "it seems fairly obvious that § 92 does not constitute Congressional regulation of that [insurance] business." *Owensboro Nat'l Bank v. Moore,* 803 F. Supp. 24, 36 (E.D. Ky. 1992). Similarly, the dissent in Owensboro found, "[T]here is little doubt that, as the district court determined below, § 92 does not specifically relate to the business of insurance." *Owensboro Nat'l Bank v. Stephens,* 44 F.3d 388, 397 (6th Cir. 1994)(Batchelder, J., dissenting)(Pet. App. at 61a-62a.) As to this question, there is no conflict between circuits.

In passing, Petitioners also assert that the decision conflicts with *United Services Auto Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). In *Muir*, the court found the purpose of the statute was not to protect policyholders, but to "prevent competition between insurers and Pennsylvania financial institutions." *Muir,* 792 F.2d at 364. Pennsylvania's statute, like Kentucky's, is different in character and function.

For these reasons, there is no square conflict between the circuits requiring this Court to grant the petition for certiorari in this matter. At best, the circuit courts are applying complicated legal principles to differing factual circumstances and arriving at a conclusion with which Petitioner simply disagrees.

2. There Is No "National Uncertainty" of "Great Practical Importance"

Because two circuits have reached different results on different facts does not establish "national uncertainty" of "great practical importance." The courts are applying this Court's "relationship" test as stated in *Fabe*, taken "directly from" *SEC v. Nat'l Sec., Inc.*, 393 U.S. at 460 (Pet. App. at 10a.) One should expect different results as each state's insurance statutes are put to the same test.

In support of its statement that there now exists great national uncertainty, Barnett argues that as many as fifteen states have "laws purporting to restrict the ability of national banks to sell insurance within the State's borders." (Pet. at 6, n.1.) One such state, however, has reviewed its law and determined that its statute was not preempted. *First Advantage*, 652 So. 2d at 562. Relying upon the analyses used in *Owensboro* and *Barnett*, Louisiana's Court of Appeal found the state's law protects policyholders "directly or indirectly," *Nat'l Sec.*, 393 U.S. at 460, and is saved from preemption by McCarran-Ferguson.

First Advantage shows that courts are applying the principles set forth by this Court's precedents, along with the analyses in *Owensboro* and *Barnett*, to the statutes before them and arriving at fair and reasoned decisions based upon factual determinations of each statute's purpose. Because a statute may be enacted for different purposes, surely different conclusions will be obtained when the statutes are put to the same *Fabe/National Securities* test. Uniform application of these legal principles, always a goal unrealized, will properly evoke differing results on different facts.

3. The Eleventh Circuit's Decision Is Correct

"The two halves of the Eleventh Circuit's analysis manifestly do not fit together" declares the bank. (Pet. App. at 16.) That is because there are not two halves to the Eleventh Circuit's analysis. There are two analyses. Each is independent of the other. To confuse the two is to risk misleading this Court.

The first analysis requires a fact-intensive determination of the *purpose* of the Florida law, applying the *Fabe/Na*tional Securities test. Questions as to whether the Florida's statute protects or regulates policyholders' interests, directly or indirectly, were answered by witnesses, caselaw, and legislative history. *See Glendale*, 584 So. 2d 534, and *Production Credit*, 356 So.2d 31. That evidence was reviewed and accepted *in toto* under the plain error standard for factual determinations, although no such error was even alleged to have occurred. The McCarran-Ferguson Act, *Fabe* and *National Securities* were then applied to those facts to determine that section 626.988 is a law possessing the " 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 133 S. Ct. at 2210. *See also Robertson v. California*, 328 U.S. 440 (1946) (licensure and regulation of insurance agents within the state's historic regulation of insurance).

Having determined that the state law was enacted for the purpose of regulating the business of insurance, the Eleventh Circuit proceeded to the second analysis. A second distinct analysis was required because this Court has stated that "State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe*, __ U.S. __, 113 S. Ct. at 2211. In the words of the unanimous Eleventh Circuit Court: "To answer this

question, we examine the section's history." *Barnett Bank* 43 F.3d at 636. (Pet. App. at 13a.) No "specific requirement" was found after an exhaustive parsing of this Court's controlling opinions. *Id.* at 636-637. (Pet. App. at 13a-15a.) What was "obvious" to the lower *Owensboro* Court, not addressed by the *Owensboro* Circuit Court majority, deemed a matter of "little doubt" by the *Owensboro* Circuit Court dissenter, and not even argued by Barnett Bank at trial below, was that: "Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance." *Barnett Bank*, 43 F.3d at 637. (Pet. App. at 15a.)

Those two analyses are consistent and compatible; they fit together perfectly. It is misleading for Petitioner to suggest that one analysis of the McCarran-Ferguson test is "narrower" than the other. Because McCarran-Ferguson governs the interplay of federal and state governments in the regulation of insurance, different policy objectives govern construction of the different terms used in McCarran-Ferguson. In *Fabe*, for example, this Court applied a "clear statement" rule to determine whether a federal statute "relates to the business of insurance." But in determining whether a state statute "regulates" the business of insurance, this Court looked to whether the underlying purpose of the state statute was protection of policyholders.

Each part of McCarran-Ferguson's test must be independently applied, one to the state statute, the other to the federal statute, to determine whether each fits within the intent of McCarran-Ferguson. The Eleventh Circuit correctly applied each analysis to the state and federal statutes at issue, in accordance with this Court's precedents.

4. This Case Is Not An Appropriate Subject for A Writ of Certiorari

The bank argues that because of conflict between this case and *Owensboro,* this case is an appropriate subject for a writ of certiorari. For the reasons set forth above, there is no direct conflict between the circuits in *Barnett* and *Owensboro*. *Barnett* was properly decided. There is no basis for issuing a writ.

5. Comptroller Did Not Intervene Below

The Comptroller of the Currency intervened in the *Owensboro* case in support of the banking interests, whereas in this case, as Petitioner notes (Pet. at 15), the Comptroller simply "voiced concern" by filing an amicus brief in the Eleventh Circuit Court. The Comptroller's filing of an amicus brief below should not substantially influence this Court's decision as to whether to issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

DAVID J. BUSCH
Counsel of Record

DANIEL Y. SUMNER
General Counsel

FLORIDA DEPARTMENT OF INSURANCE
200 E. Gaines Street, Suite 645A
Tallahassee, FL 32399-0307
(904) 413-4146

Attorneys for Respondents
Tom Gallagher and the
Florida Department of Insurance